BEST AVAILABLE COPY

No. 06-1005

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EFRAIN SANTOS and BENEDICTO DIAZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT EFRAIN SANTOS

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QUESTION PRESENTED

Whether the undefined term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956(a)(1), which has two common meanings in the context of financial transactions, should be construed to mean "profits" where (a) the consequence of the Government's "gross receipts" construction makes every violation of the illegal gambling business statute, 18 U.S.C. § 1955, also a money laundering violation under § 1956(a)(1)(A)(i); and (b) the legislative history and rule of lenity both compel a "profits" definition.

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STATUTORY PROVISIONS INVOLVED

1. Under the money laundering statute, 18 U.S.C. § 1956, proscribed activity known as "promotion" money laundering occurs where a person:

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity;
> > . . . .

18 U.S.C. § 1956(a)(1).

Section 1956 defines the term "specified unlawful activity" as "any act or activity constituting an offense listed in [18 U.S.C. § 1961(1)]." 18 U.S.C. § 1956(c)(7)(A). The offenses listed in 18 U.S.C. § 1961(1) include operation of an illegal gambling business in violation of 18 U.S.C. § 1955.

Section 1956 does not define the term "proceeds."

2. 18 U.S.C. § 1955 makes it a crime to "conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business." 18 U.S.C. § 1955(a). For purposes of § 1955, an "illegal gambling business" means:

> [A] gambling business which –
>
> > (i) is a violation of the law of a State or political subdivision in which it is conducted;

> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(b)(1).

3. As pertinent to the § 1955 convictions in this case, the state law proscribing a gambling business is Indiana Code § 35-45-5-3, which provides in pertinent part:

> A person who knowingly or intentionally:
>
> * * *
>
> (4) conducts lotteries or policy or number games or sells chances therein; [or]
>
> * * *
>
> (6) accepts, or offers to accept, for profit, money, or other property risked in gambling; commits professional gambling, a Class D felony.

IND. CODE § 35-45-5-3(a). The following statutory definitions govern this state law offense:

> "Gain" means direct realization of winnings.
>
> "Gambling" means risking money or other property for gain, contingent in whole or in part upon lot,

> chance, or the operation of an illegal gambling device
>
> . . . .
>
> * * *
>
> "Profit" means a realized or unrealized benefit (other than a gain) and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

IND. CODE § 35-45-5-1.

STATEMENT

1. Respondent Efrain Santos was charged with conducting a type of lottery known as a "bolita." Gamblers (bettors) placed bets with "runners"; the runners would take commissions of 15-20% from the bet money and deliver the betting slips and the balance of the money to "collectors." After taking a "salary" out of the bet money, the collectors would deliver the betting slips and remaining bet money to Santos. Santos paid the bolita's winners. Pet. App. 2a, 19a.

Based on these transactions, Santos was convicted under 18 U.S.C. § 1955 of conducting an illegal gambling business violative of Indiana law, and of conspiring to conduct an illegal gambling business in violation of 18 U.S.C. § 371.

Based upon the same "runner" commissions, "collector" salaries, and payments to winners, Santos also was convicted of money laundering and conspiracy to commit money laundering under the "promotion" prong of the federal money laundering statute, 18 U.S.C § 1956(a)(1)(A)(i). Santos was not charged with "conceal[ing] or disguis[ing] the nature, the location, the source, the ownership, or the control of the proceeds of" the illegal gambling business in violation of the concealment

prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(B)(i).

Santos was sentenced to concurrent prison terms of 60 months for the illegal gambling business convictions and 210 months for the money laundering convictions. Pet. App. 18a, 20a.

2. On direct appeal, Santos presented a single issue for review: Whether "the evidence was insufficient to convict him of money laundering because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i)." *United States v. Febus*, 218 F.3d 784, 789 (7th Cir.), *cert. denied*, 531 U.S. 1021 (2000). The Seventh Circuit upheld Santos's money laundering convictions, based on circuit precedent that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Id.* (quoting *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The *Febus* panel reasoned that the collectors' commissions "compensated them for collecting the [bolita's] increased revenue and transferring those funds back to [Santos]," and that paying winning bettors "promoted the bolita's continued prosperity by maintaining and increasing the players' patronage." *Id.* at 790. This Court denied Santos' petition for a writ of certiorari.

3. On November 30, 2001, Santos timely filed his *pro se* request for relief pursuant to 28 U.S.C. § 2255. On February 28, 2002, before the Government had responded to Santos' § 2255 motion, the Seventh Circuit decided *United States v. Scialabba*, 282 F.3d 475 (7th Cir.) (Easterbrook, J.), *cert. denied*, 537 U.S. 1071 (2002), which addressed the meaning of the term "proceeds" in § 1956(a)(1) as it relates to business-like criminal

activity. The defendants in *Scialabba* were convicted of promotion money laundering under § 1956(a)(1)(A)(i) based on transactions involved in operating an illegal gambling business. *Id.* at 475-76. There, the defendants provided video poker machines to various establishments. *Id.* The defendants would split the money from the video machines with the owners of the establishments. *Id.* at 476. The splits were intended, *inter alia*, to reimburse the owners for payments the owners made to winning gamblers. *Id.*

In vacating the money laundering convictions, the *Scialabba* panel rejected the Government's argument that "proceeds" means gross income or gross receipts. *Id.* at 477. The court observed that the statute does not contain a definition supporting this broad interpretation of "proceeds," and a common understanding of that term leads to the narrower "net income" interpretation. *Id.* Had Congress intended otherwise, "[i]t would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1)," and "the Rule of Lenity counsels against transmuting the latter into the former." *Id.*

The *Scialabba* court further reasoned that construing the term "proceeds" to mean gross receipts would result in situations where the specified unlawful activity automatically violates the money laundering statute. *Id.* By interpreting "proceeds" to mean profits, the court ensured that the gambling statute and the money laundering statute applied to separate and distinct "steps in a criminal enterprise." *Id.* The court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise, the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

4. The Government brought the *Scialabba* decision to the district court's attention before filing its response to Santos'

§ 2255 motion. With the court's approval, the parties agreed that Santos' § 2255 motion would include the question of whether *Scialabba* required his convictions for money laundering be set aside and that he be re-sentenced. Pet. App. 25a & n.5. The court, noting that the facts of *Scialabba* were "amazingly similar" to those of Santos's case (as did the Government), *id.* at 39a, found that Santos's money laundering convictions must be vacated under the holding of *Scialabba*. *Id.* at 48a-49a.

The Seventh Circuit, on the Government's appeal, upheld the district court's decision. *United States v. Santos*, 461 F.3d 886 (7th Cir. 2006); Pet. App. 1a-16a. The court said "[t]he transactions in the present case – compensating the bolita's collectors and paying its winners – are conceptually indistinguishable from the transactions in *Scialabba* which were held to be insufficient under § 1956(a)(1)(A)(i)." Pet. App. 8a. Specifically, these "payments of the bolita's operating expenses came out of its gross income." *Id.* at 8a-9a. The Seventh Circuit also affirmed that *Scialabba* did not decide any issue concerning the concealment prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(B). *Id.* at 12a-13a.

SUMMARY OF ARGUMENT

A. The Government presents a seemingly simple question: "whether 'proceeds' means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses." Gov't Br. (I). The issue is not so simple, however, because of the practical consequences of the Government's gross receipts construction. Combined with the Government's broad application of the "promotion" prong of the money laundering statute, the gross receipts construction makes every violation of the illegal gambling business statute an automatic violation of the money laundering statute. This is not merely some hypothetical possibility, as shown by the facts of this case.

Santos' only supposed "transactions in proceeds" were transactions necessary to the operation of every illegal gambling business. Both this Court's precedent and the applicable principles of statutory construction counsel against construing criminal statutes tc create multiple offenses and multiple punishments for the same conduct.

B. Furthermore, the term "proceeds" is ambiguous as between gross and net. For every dictionary definition the Government cites supporting a gross receipts interpretation, there is at least one of equal prominence supporting the interpretation of proceeds as meaning profits. This Court's precedent employs two methods for resolving ambiguity in the ambit of criminal statutes. Both methods lead directly to the profits definition of proceeds in the money laundering statute.

First, the legislative history of the money laundering statute demonstrates that Congress was concerned about profits of criminal activity, which supports a profits construction of proceeds. This on-point legislative material cannot be superseded by the legislative history of another statute relied on by the Government – especially where the other history is itself ambiguous.

The second method used to resolve ambiguity in criminal statutes, when other means of construction do not clearly answer the question, is the rule of lenity. This rule, which is grounded in due process and the respective constitutional roles of the legislative and judicial branches of government, also squarely supports choosing the profits construction of proceeds. In contrast, the Government's claim about the burden of proving profits, which is overblown and speculative in any event, is not grounded in any principle governing judicial construction of criminal statutes – but rather constitutes a plea for legislative amendment properly directed to Congress.

C. The judgment below should also be affirmed because the money laundering statute requires "a financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). As the Government acknowledges, Congress intended that this be a monetary transaction separate from and in addition to the predicate crime. Here, there was no financial transaction in proceeds that was separate from and in addition to the underlying crime of operating an illegal gambling business. Rather, the only financial transactions the Government proved – (1) the collection and delivery to Santos of bet money and betting slips, with the "runners" and "collectors" deducting their compensation from bet money before passing on the balance; and (2) the payment of winnings to winning bettors – are transactions constituting the operation of an illegal gambling business under 18 U.S.C. § 1955(a). Contrary to the Government's argument, these transactions are a necessary part of conducting an illegal gambling business in violation of Federal law and the underlying Indiana state law. Section 1956(a)(1), on the other hand, requires a transaction in the proceeds of specified unlawful activity *other than* the mere consummation of the specified unlawful activity itself.

ARGUMENT

I. Construing "Proceeds" As "Profits" Supports The Purpose Of The Money Laundering Statute And Avoids Making Every Illegal Gambling Business Also A Money Laundering Crime.

A. Under The Government's Construction Of "Proceeds" As "Gross Receipts," Every Person Convicted Of Illegal Gambling Under 18 U.S.C. § 1955 Would Also Be Guilty Of Money Laundering Under 18 U.S.C. § 1956(a)(1)(A)(i).

1. Under the Government's construction of "proceeds" as meaning "gross receipts," any person guilty of conducting an illegal gambling business in violation of 18 U.S.C. § 1955 would be automatically guilty of promotion money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). The reason for this is the Government's position, adopted by the court in Santos' direct appeal, that simply paying bet collectors and winning bettors "promotes" gambling under the money laundering statute. *United States v. Febus*, 218 F.3d 784, 789-90 (7th Cir.), *cert. denied*, 531 U.S. 784 (2000). *Every* prosecution for operating an illegal gambling business will involve a gambling business that paid its collectors and winning bettors. Accordingly, construing "proceeds" in the money laundering statute to mean net proceeds is necessary to keep the two crimes separate. *United States v. Scialabba*, 282 F.3d 475, 475-77 (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002).

Scialabba also involved running an illegal gambling business in violation of § 1955 as the predicate crime, and was decided after that court had accepted the Government's position that paying collectors and winners constitutes promotion of

illegal gambling under the money laundering statute. Judge Easterbrook reasoned in *Scialabba* that:

> If . . . the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. *See, e.g., Heflin v. United States*, 358 U.S. 415 (1959); *Simpson v. United States*, 435 U.S. 6 (1978); *Busic v. United States*, 446 U.S. 398 (1980). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and *ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.*

Id. at 477 (emphasis added).

In *United States v. Malone*, 484 F.3d 916, 921 (7th Cir. 2007), the Seventh Circuit further discussed the relationship between (1) its holding in *Scialabba* that "proceeds" means net proceeds (or profits) and (2) its holding in *Febus* that activities which are part of the underlying crime can also "promote" the carrying on of that crime:

> We have previously held that the promotion element can be met by "transactions that promote the continued prosperity of the underlying offense," i.e., *that at least some activities that are part and parcel of the underlying offense can be considered to promote the carrying on of the unlawful activity. Febus*, 218 F.3d at 790. But whether these activities can be considered transactions in the proceeds of the unlawful activity is a separate question. In *United States v. Scialabba*, 282 F.3d 475, 476-78 (7th Cir. 2002), we recognized the absence of any clear

> definition of "proceeds" in the money laundering statute in holding that defendants who operated illegal video poker machines in taverns and other establishments were not guilty of money laundering for making winner payouts and compensatory payments to the tavern owners who helped facilitate the operation. We explained that, unlike the act of reinvesting a criminal operation's net income to promote the carrying on of the operation, the act of paying a criminal operation's expenses out of gross income is not punishable as a transaction in proceeds under § 1956(a)(1)(A)(i). *Id.* at 476; *see also Santos v. United States*, 461 F.3d 886, 893 (7th Cir. 2006) (declining to overrule *Scialabba* in the face of conflicting holdings in other circuits). In doing so, we relied on *the rule of lenity* (which instructs that statutory ambiguities should be resolved in favor of the defendant) and a desire to *avoid convicting a defendant of multiple crimes "when the transactions that violate one statute necessarily violate another."* 282 F.3d at 477.

Id. (emphasis added) (Evans, J., joined by Easterbrook and Posner, JJ.).[1]

2. The Government contests this point only by arguing about the essential elements of the two crimes. *See* Gov't Br. 41-42. As discussed later, that argument misstates the pertinent

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[1] The Government argued below that *Scialabba* conflicted with *Febus*, *see* Pet. App. 22a, and that *Scialabba* was not "a proper interpretation of the *promotion prong* of the money laundering statute." Gov't Resp. Br. to Santos § 2255 Motion at 29 (emphasis added). As this argument recognized, the meaning of "proceeds" cannot be decided in isolation from the "promotion" context of the money laundering statute and the *Febus* opinion on the scope of "a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote." *Id.*

Indiana gambling statutes. *See* Part III, *infra*. The point here, however, is simpler. Operating an illegal gambling business under 18 U.S.C. § 1955 requires not only a gambling business that is illegal under state law but also a business that "involves five or more persons" and "has been or remains in substantially continuous operations of a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(1). As a practical matter, there will never be an illegal gambling business that does not pay its bet collectors and winning bettors. The Government does not suggest otherwise, notwithstanding its argument concerning the technical elements of the respective crimes.[2]

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[2] This point is brought into even sharper relief by another opinion adopting the Government's construction that paying winning bettors constitutes "promotion" under the money laundering statute, reasoning that "nothing makes an illegal gambling operation flourish more than the prompt payment of winners[.]" *United States v. Iacaboni*, 363 F.3d 1, 5 (1st Cir. 2004) (citations omitted). This amounts to saying a person promotes a business by running a business. Hence, conducting a gambling business in violation of § 1955 collapses into promotion money laundering under § 1956(a)(1)(A)(i) if proceeds means gross receipts. The further discussion in *Iacaboni*, which also adopts the Government's "gross receipts" construction, illustrates this point too. Aside from the court's discussion of concealment-type issues – which are separately addressed by § 1956(a)(1)(B)(i) – its analysis is that payments to winning bettors "reflects the decision of Congress . . . to proscribe not only certain unlawful cash-generating schemes, but also the means by with they are carried out . . . ." *Id.* at 6. In other words, Congress "proscribed not only" conducting an illegal gambling business (*i.e.*, the "unlawful cash generating scheme[]") "but also" conducting an illegal gambling business (*i.e.*, "the means by which" the unlawful cash is generated). The district court in *Iacaboni* was even more straightforward:

> [P]aying winners is obviously part and parcel of the crime of operating an illegal gambling business . . . . Under the Government's logic, *any* illegal gambling operation would also be a money laundering operation.

(Cont'd)

Consequently, every gambling business violative of § 1955 will also be promotion money laundering violative of § 1956(a)(1)(A)(i) if "proceeds" in the latter statute means gross receipts. Having adopted the Government's statutory construction that paying collectors and winners – "activities that are part and parcel of the underlying [gambling] offense," *Malone*, 484 F.3d at 921 – constitutes "promot[ion]" under the money laundering statute, the Seventh Circuit correctly concluded that "proceeds" under the latter statute must mean profits in order to "ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." *Scialabba*, 282 F.3d at 477.

This point is not undermined in Santos's case by the *Febus* court's statements about "plowing back proceeds of [the illegal activity] to promote that activity"; that "Santos reinvested the bolita's proceeds to ensure its continued operation"; and this resulted in the bolita's gross revenues increasing over a 6-year period from $250,000 to $410,000 annually. 218 F.3d at 789-90. By "plowing back" and "reinvesting" proceeds, the Seventh Circuit meant only "pay[ing] the bolita's collectors and winners." *See id.* Those payments were all the Government proved, as it acknowledges here. Gov't Br. 4-5. With respect to the increase in betting revenues, the Government did not present evidence that reinvestment of profits was necessary for that to happen. Nor is such a proposition self-evident. An illegal lottery may not involve significant fixed costs, and therefore not require capital investment (through reinvesting profits or otherwise) for gross revenues to increase.

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United States v. Iacaboni, 221 F.Supp.2d 104, 113 (D. Mass. 2002) (emphasis in original), *aff'd in part and rev'd in part on other grounds*, 363 F.3d 1 (1st Cir. 2004).

B. The Applicable Legal Principles Compel Construing "Proceeds" As "Profits" To Avoid Creating Multiple Offenses For The Same Conduct.

1. The undefined term "proceeds" in § 1956 has two common meanings in the context of financial transactions: both net receipts (or profits) and gross receipts. *See* Part II(A), *infra*. It is elementary in statutory construction (as in language generally) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (defining a term by considering its context and noting that "[t]he definition of words in isolation, however, is not necessarily controlling in statutory construction.").

Construing "proceeds" in context requires reading that term in light of the Government's statutory gloss, adopted by the Seventh Circuit in *Febus*, that paying bet collectors and winning bettors "promote[s]" an illegal gambling business – together with its necessary consequence that, unless proceeds means profits, conducting a gambling business in violation of § 1955 automatically constitutes promotion money laundering in violation of § 1956 (a)(1)(A)(i). As held in *Simpson v. United States*, 435 U.S. 6, 15-16 (1978) – one of the cases the Seventh Circuit relied on in *Scialabba*, 282 F.3d at 477 – "absent a clear and definite legislative directive," construction of criminal statutes as duplicative is disfavored. "[T]his Court has steadfastly insisted that doubt will be resolved against turning a single transaction into multiple offenses." *Simpson*, 435 U.S. at 15 (citations omitted).

2. The "tools" the Court employs to ascertain what "Congress had in mind" in circumstances like these are the "appropriate legislative materials" and the "rule of lenity." *Busic v. United States*, 446 U.S. 398, 407 (1980) (also cited in *Scialabba*, 282 F.3d at 477).

The legislative history of the money laundering statute stands squarely against construing § 1956(a)(1)(A)(i) in a manner that makes it collapse into the illegal gambling statute. Congress "intended money laundering to be a *separate* crime *distinct* from the underlying offense that generated the proceeds," *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) (emphasis added) (citing S. REP. NO. 99-433, 99th Cong., 2d Sess. (1986) ("1986 Senate Report"); H.R. REP. NO. 855, 99th Cong. 2d Sess., pt.1 (1986) ("1986 House Report"))); and "to punish activity that was *not* previously punished," *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991) (emphasis added) (citing 1986 Senate Report, S. REP. NO. 99-433, at 1-9); *accord, e.g., United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994). This is just like *Heflin v. United States*, 358 U.S. 415 (1959) – another case relied upon in *Scialabba*, 282 F.3d at 477 – where this Court held a defendant may not be convicted under the Bank Robbery Act for both taking and feloniously receiving the same property based on the same conduct. *Hefflin*, 358 U.S. at 419-20. The Court relied on the legislative history of the Act to conclude that "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Id.*

The other "tool," the rule of lenity, cuts in the same direction. The Court "resolve[s] an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Id.* at 419.[3]

These principles of statutory construction apply with particular force here because, under the Government's construction of the money laundering statute, the *identical conduct* Congress determined should be subject to a maximum punishment of five years imprisonment under the gambling statute becomes subject to punishment up to *four times* longer.

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[3] The rule of lenity also requires that "proceeds" – if ambiguous even when read in context – be construed as profits. *See* Part II(C), *infra*.

See Gov't Br. 9 (240 months compared to 60 months). Santos was sentenced to 210 months on the money laundering charges, which is more than triple the maximum punishment under the gambling statute, even though the Government's evidence shows he did *nothing* that was not already punished by that statute.

"Th[e] policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson*, 435 U.S. at 15 (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). Here, "what Congress intended" is known, and it did *not* intend "to further penalize the underlying criminal conduct," *United States v. Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (citing 1986 Senate Report, S. REP. NO. 99-433, and 1986 House Report, H.R. REP. NO. 99-855), nor "to afford an alternative means of punishing the prior 'specified unlawful activity,'" *Edgmon*, 952 F.2d at 1213-14 (citing 1986 Senate Report). *Accord, e.g.*, *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992). The only thing accomplished by using the money laundering statute to multiply Santos' punishment nearly fourfold for paying collectors and winners is to "further penalize" the activity already punished under the gambling statute, which is exactly what Congress did not intend the money laundering statute to do.

3. The immediate statutory context of "proceeds" is "conduct[ing] or attempting to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity . . . ." 18 U.S.C. § 1956(a)(1)(A)(ii).

Given this context, an especially informative dictionary definition of "proceeds" is: "money obtained from an event or activity: *proceeds will help purchase new equipment.*" NEW OXFORD AMERICAN DICTIONARY 1351 (2d ed. 2005) (emphasis in original). The example provided goes to the heart of promotion money laundering. Santos could not have used

the money paid as commissions to his collectors to purchase, for example, new equipment to promote his illegal gambling business. Nor could he have used the money paid to bet winners to purchase new equipment to promote his illegal gambling business. Rather, he had to use that money to pay his collectors, runners, and winners in order run an illegal gambling business. The only "proceeds" that Santos could have used to promote his gambling business by purchasing new equipment would have been profits – and the Government admittedly did not present evidence that Santos conducted any transaction involving any profits with an intent to promote the gambling business. Gov't Br. 4-5; *see also* Gov't Seventh Circuit Br. 7 ("The government presented no evidence at trial that any of the funds used by Santos to pay winners, runners, or collectors were 'net profits.'"). Thus, the Government "concedes that, if the word 'proceeds' does not mean gross receipts, it presented insufficient evidence at trial to convict Santos of money laundering." *Id.*

4. The Government says the Seventh Circuit's construction "of the scope of the promotion component" is inconsistent with the money laundering statute "as it has been traditionally understood." Gov't Br. 24. There is, however, no "traditional" understanding that conduct necessary to the crime of conducting an illegal gambling business simultaneously violates the money laundering statute. The Government cites only two cases to that effect, one of which was decided after *Scialabba* and the other of which did not present the statutory construction issue. Gov't Br. 39 (citing *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004), and *United States v. Conley*, 37 F.3d 970, 978 (3d Cir. 1994)); *see also Scialabba*, 282 F.3d at 478 (discussing *Conley*).

The pertinent "tradition" under the money laundering statute is the Government taking extreme positions that are repeatedly rejected by the appellate courts. These include the Government's claim that the "concealment" prong of § 1956(a)(1) is satisfied by *any* transaction using proceeds of underlying unlawful

activity, such as purchasing items for personal use.[4] The Government has similarly claimed that using proceeds to purchase personal items or to pay legitimate business expenses satisfies the promotion prong.[5] The Government also has repeatedly claimed transactions that were an integral part of the predicate crime simultaneously constituted transactions in proceeds violating the money laundering statute.[6]

Previously, the Government's most extreme position may have been in *Heaps*, where it claimed the defendant's receipt of payment for an illegal drug sale, followed by his putting the payment in a drawer, constituted a transaction in proceeds promoting that illegal sale. *Heaps*, 39 F.3d at 484-86. The Fourth Circuit rejected the Government's position because it would have made any illegal drug transaction also an automatic money laundering crime:

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[4] *See United States v. Sanders*, 928 F.2d 940, 945-46 (10th Cir. 1991) (rejecting this attempt to "turn the money laundering statute into a 'money spending statute'" and reversing money laundering convictions); *see also, e.g., United States v. Blankenship*, 382 F.3d 1110, 1130-31 (11th Cir. 2004) ("This seems to be a simple case of governmental overreaching"; reversing money laundering convictions); *United States v. Johnson*, 440 F.3d 1286, 1293 (11th Cir. 2006) (reversing money laundering convictions); *United States v. Olaniyi-Oke*, 199 F.3d 767, 770-71 (5th Cir. 1999) (same); *United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995) (same); *United States v. Shoff*, 151 F.3d 889, 892 (8th Cir. 1998) (same); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (same).

[5] *See, e.g., United States v. McGahee*, 257 F.3d 520, 526-27 (6th Cir. 2001) (reversing money laundering convictions); *Olaniyi-Oke*, 199 F.3d at 770 (same); *United States v. Brown*, 186 F.3d 661, 668-71 (5th Cir. 1999) (same); *see also United States v. Calderon*, 169 F.3d 718, 721 (11th Cir. 1999).

[6] *See, e.g., United States v. Christo*, 129 F.3d 578 (11th Cir. 1997) (reversing money laundering convictions); *United States v. Gaytan*, 74 F.3d 545, 555-56 (5th Cir. 1996) (same); *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (same). This category is further discussed in Part III, *infra*.

> Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually *every* sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way, § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws.

Id. at 485-86 (emphasis in original). The Government now apparently accepts *Heaps* as correctly rejecting this position. *See* Gov't Br. 37 (citing *Heaps* with apparent approval). Yet the Government tries to accomplish the same extreme result in this case, where its position would make every operation of an illegal gambling business "an automatic money laundering violation." *Heaps*, 93 F.3d at 485.

5. The Government also argues the profits construction "would logically also apply in concealment cases," and that this is inconsistent with the purpose of the concealment prong of the money laundering statute. Gov't Br. 26-27. However, the Seventh Circuit has not decided that the profits requirement applies to money laundering under the concealment prong. Pet. App. 12a-13a. Moreover, the court indicated that even under the promotion prong, the profits requirement may apply only where the underlying crime "entails voluntary, business-like transactions." *Scialabba*, 282 F.3d at 475. If, as the Seventh Circuit suggested, the meaning of "proceeds" can vary depending upon the type of underlying crime, it may also apply differently as between types of money laundering. In particular, a key problem which the profits construction solves – "convicting a defendant of multiple crimes 'when the transactions that violate one statute necessarily violate another,'" *Malone*, 484 F.3d at 921 (citation omitted) – will not arise under the concealment prong so long as some proof of concealment is required beyond the type of transactions necessarily involved in the underlying criminal activity.

If, however, the profits construction is applied to concealment cases as a matter of logic (*i.e.*, because the "proceeds" term in § 1956(a)(1) applies to both promotion and concealment prongs), that will directly result from the Government's urging a statutory construction under which "activities that are part and parcel of the underlying offense can be considered to promote the carrying on of the unlawful activity." *Id.* (citation omitted). Construing "proceeds" as profits avoids unfair and unwarranted multiple convictions based on the same conduct, contrary to the intended effect of the money laundering statute. "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to legislative purpose, is . . . a traditional and appropriate function of the courts." *Sorrells v. United States*, 287 U.S. 435, 450 (1932).

II. If The Term "Proceeds" Is Ambiguous, The Legislative History And The Rule Of Lenity Compel A "Profits" Construction.

If the Court finds that statutory context does not clarify the meaning of the term "proceeds," as addressed above, the term is at the least ambiguous. Contrary to the Government's argument, "proceeds" does not have *one* common meaning in the context of financial transactions. Rather, the dictionary definitions support at least two common meanings: net receipts (or profits) and gross receipts. Neither meaning is obviously more appropriate (or "primary") than the other. Apart from construing the term in its statutory context, there are two methods for deciding which of the two common meanings of "proceeds" should be adopted: examination of the legislative history and application of the rule of lenity. Either leads to a construction of "proceeds" as "profits."

A. The Term "Proceeds" Commonly Means Either Gross Receipts Or Profits.

When a word is not defined by statute (as is the case here), this Court "normally construe[s] it in accord with its ordinary

or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Relying on selected dictionary definitions, the Government suggests a straightforward enquiry into the "plain meaning" to define "proceeds" as "gross receipts." However, the dictionaries relied on by the Government, as well as many other dictionaries the Government ignores, prove that "proceeds" has no single common meaning in the financial transactions context.[7]

A review of various Webster's dictionaries shows that "proceeds" is commonly understood to mean *both* gross receipts *and* profits: WEBSTER'S NEW CENTURY DICTIONARY 511 (2001) (defining "proceeds" as "the total amount of money brought in; the net amount received"); WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 629 (2001) (defining "proceeds" as "the total amount or profit, derived from a sale or other transaction"); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1072 (3d college ed. 1988) (defining "proceeds" as "the money or profit derived from a sale, business venture, etc."); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1542 (2d ed. 1998) (defining "proceeds" as "**b.** the total amount derived from a sale or other transaction . . . **c.** the profits or returns from a sale, investment, etc."); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 929 (10th ed. 1995) (defining "proceeds" as: "1: the total amount brought in <the proceeds of a sale> 2: the net amount received (as for a check or from an insurance settlement) after deduction of any

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[7] The Government's own cited definitions – which rely on terms and phrases such as "results," "accrues," "derives," "received," "brought in," "obtained," "produced," "realized," and "when converted," *see* Gov't Br. 13-14 – are inherently ambiguous and therefore unhelpful in defining "proceeds" in § 1956(a)(1). If anything, these definitions support a profits construction. For example, if a house is sold for $150,000 and its seller has a $100,000 mortgage, the proceeds "received," "realized," "accrued," "obtained," etc., by the seller is $50,000, or the net amount.

discount or charges."). Synonyms for "proceeds" include "profits, earnings, gain, lucre, return." MERRIAM WEBSTER'S COLLEGIATE THESAURUS 579 (1988).[8]

In sum, the most a canvassing of dictionaries accomplishes is proving that the "proceeds" term in the money laundering statute is ambiguous. *Accord United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004), *vacated and remanded on other*

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[8] A Google search ("define: proceeds") returns several definitions, the first three of which are net:

> return: the income or profit arising from such transactions as the sale of land or other property; "the average return was about 5%." wordnet.princeton.edu/perl/webwn
>
> An amount received from selling a security after commissions are deducted. www.tiaa-crefbrokerage.com/invest_glosry_PrPt.htm
>
> The net amount of money payable by the insurer at the death of an insured or at the maturity of a policy. www.farmers.com/FarmComm/WebSite/html/glossary/glossaryP.jsp

Another investment-related website makes clear that "proceeds" commonly means both "net" and "gross" receipts. *See* http://www.investorwords.com/3870/proceeds.html (defining "proceeds" as "Money received through a sale or loan. The term sometimes refers to net proceeds (after any commissions, fees or other charges are deducted), and sometimes refers to gross proceeds (before such deductions)."). Other dictionary definitions support a "net" interpretation of "proceeds." *E.g.*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1398 (4th ed. 2000) (defining "proceeds" as "[t]he amount of money derived from a commercial or fundraising venture; the *yield*.") (emphasis added); THE SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002) (defining "proceeds" as "[m]oney produced or gained by a transaction or undertaking; *profit*; an outcome, a result.") (emphasis added).

grounds, 544 U.S. 945 (2005). The most that can be said of the Government's dictionary definitions is that the "gross receipts" construction it prefers is merely one possible interpretation of an ambiguous term in a criminal statute. In this situation, both the relevant legislative history and the rule of lenity require the more lenient "profits" construction of "proceeds."

B. The Legislative History Shows Congress Was Focused On "Profits" Of Criminal Activity.

1. The legislative history of the money laundering statute reveals that Congress was focused on the use of the "profits" from criminal activity. The 1986 Senate Report explains the purpose of the money laundering act:

> The purposes of S. 2683, the Money Laundering Crimes Act of 1986, are: To create a Federal offense against money laundering; to authorize forfeiture of the *profits* earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.

1986 Senate Report, *supra*, S. REP. NO. 99-433, at 1 (emphasis added). *See also id.* at 2 ("The growth of money laundering has been a corollary of the spread of *profitable* illegal enterprises.") (emphasis added); *id.* at 9 (quoting Sen. Thurmond, Chairman of the Judiciary Committee, the sponsor of the money laundering bill: "Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap *profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes.") (emphasis added).

The congressional record is quite clear that Congress intended to address the practice, particularly in organized crime, of transforming illegal profits into legitimate income, which is the very essence of money laundering. Receipts cannot make that transformation until the expenses of the illicit activity have been taken care of and only if the expenses do not exceed the gross proceeds. Hence, comments during the floor debate make clear that Congress was targeting *profits* generated by illicit activity.

> Gangsters and drug traffickers have demonstrated the importance they attach to money laundering by making it so pervasive and sophisticated that it has become a threat to the reputation of America's banking system. True, launderers do resort to casinos and other vehicles to hide their illegal *profits*. But they do not hesitate to employ local banks, banks with international customers, brokerage houses, and indeed America's financial networks.
>
> * * *
>
> The crime chieftains are using a variety of techniques and a variety of locations to inject their *profits* into the American financial system.

132 CONG. REC. 2, 1983 (1986) (statement of Rep. Lungren) (emphasis added).

> The need to eliminate the *profitability* of criminal activity has become a national priority.
>
> In order to eliminate the *profitability* of criminal activity the administration and Congress have focused their attention on money laundering. Money Laundering has been defined by the President's

> Commission on Organized Crime as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." Simply, it is a process by which criminals can take their illegal *profits* and give them the appearance of being earned legitimately.

Id. at 1989 (statement of Rep. Meyers) (emphasis added).

> That is the *profit* that is in the narcotics business. If we can get at the *profit*, if we can make it too expensive for the big money, organized criminals to get involved and to continue this high-level operation, we can make a very significant impact on the entire process.

Id. at 1986 (statement of Rep. McCollum) (emphasis added).

> "Money Laundering" is the term applied to the act of making funds from illegal sources appear as legitimate income. Without money laundering, the *profits* of illegal gambling, prostitution, extortion, drug trafficking, etcetera, could not be realized. Eliminating money laundering, therefore, would help to take *profit* out of the crime . . . . [A]n attack on money laundering is an attack on the *profit* of drug trafficking and other organized crimes. These criminals are *profit*-oriented, and an attack on their pocket books attacks the heart of the criminal enterprise.[9]

Id. at 1989 (statement of Rep. Fish) (emphasis added).

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[9] This statement of Representative Fish – that "criminals are profit-oriented," 132 CONG. REC. 2, 1989 (1986) – illustrates the weakness of

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> A wide variety of organized criminal groups, could not reap the *profits* of their unlawful activity without the means to camouflage their proceeds to appear as though they came from legitimate sources and business investments. This bill would severely restrict the ability of criminal groups to disguise and profit from illegal *gains*.

131 CONG. REC. 12, 16717 (1985) (statement of Sen. Thurmond) (emphasis added).

> The House of Representatives is duty bound to protect the banking system and our communities from money laundering. I believe that if we stop money laundering we would eliminate the *profit* of the underlying crimes *because the purpose of money laundering is to make illegal profits appear as legitimate income.*

Id. at 16173 (statement of Rep. McCollum) (emphasis added).

> Money Laundering is the lynchpin of organized drug trafficking schemes and hundreds of American financial institutions are wittingly and unwittingly feeding the lifeblood of drug trafficking by assisting in the laundering of billions of U.S. Dollars.
>
> * * *

(Cont'd)

the Government's argument that unprofitable criminals would escape money laundering. *See* Gov't Br. 25 (arguing that "an inept criminal who never managed to earn a profit would never be guilty of money laundering at all"). Congress did not intend the money laundering statute to target "inept" criminals – but instead the *profits* of "big money, organized crime." *See* 132 CONG. REC. 2, 1986 (1986) (statement of Rep. McCollum).

> If we are ever going to take the *profit* out of crime we must attack those *profits* directly.

131 CONG. REC. 4, 4541, 4543 (1985) (statement of Rep. McCollum) (emphasis added).

> Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap *profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes.

132 CONG. REC. 32, 17571 (1986) (statement of Sen. Thurmond) (emphasis added).

> The methods by which drug runners *conceal their illicit profits and reinvest them* in the drug trade are a vital part of the overall drug problem. The Senate recognized this reality when it voted 98-0 recently for a bill making *willful laundering of profits from criminal enterprises a federal offense.*

132 CONG. REC. 16, 22504 (1986) (statement of Sen. Trible) (commenting on the Drug Money Laundering Prevention Act of 1986) (emphasis added).

2. Incredibly, the Government does not cite the legislative history of the money laundering statute – but instead relies on the legislative history of *another* statute, the amended forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* *See* Gov't. Br. 16-17 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 199 (1983)). If legislative history has relevance in statutory construction, the legislative history of the statute in issue has the primary, if not exclusive, relevance.

Furthermore, the legislative history of RICO's forfeiture provision does not dictate that "proceeds" even in that statute means gross receipts. The legislative history quoted by the Government suggests that "*net* profits" need not be proven. Gov't Br. 16 (quoting S. REP. NO. 225, *supra*, at 199 & n.24 ("[i]t should not be necessary for the prosecutor to prove what the defendant's *overhead expenses* were") (emphasis added)). However, the potential meanings of proceeds are not limited to "gross receipts" on the one hand and "net profits" on the other. Most obviously, "proceeds" can also mean gross profits – *i.e.*, gross receipts less only direct costs – as some courts have held under the RICO forfeiture statute, 18 U.S.C. § 1963(a)(3). *United States v. Lizza Indus.*, 775 F.2d 492, 498 (2d Cir. 1985); *United States v. Milicia*, 769 F. Supp. 877, 887-89 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 1569 (3d Cir. 1992); *see also United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (construing "proceeds" in RICO's forfeiture provision to mean "something less than the gross receipts of a defendant's . . . business . . ."). In this case, Santos prevails under either a net profits or gross profits definition of proceeds, because Government did not prove either measure.

3. The Government's reliance on other statutes (*see* Gov't Br. 17-19) also does not compel the "gross receipts" construction it urges for the money laundering statute. As the Government admits, Congress has sometimes used "proceeds," sometimes "gross proceeds," and sometimes "gross receipts." *Id.* 19 & n.2. Contrary to the Government's claim that these terms are used interchangeably, these different terms – in particular, "gross proceeds" versus "proceeds" – require different scope. This is supported by dictionary definitions of "proceeds" as both gross amounts and net amounts (or profits). The fact that Congress has sometimes used "gross proceeds" suggests only Congress' intent there to apply the broader common meaning of "proceeds." The absence in the money laundering statute of the adjective "gross" suggests that Congress did not intend to apply the broad meaning of "proceeds" in this statute.

Congress thus knew to use specific terms such as "gross receipts" and "gross proceeds" when it intended to target the gross amount received. Originally, both 18 U.S.C. § 982 and its civil forfeiture counterpart, 18 U.S.C. § 981, used the term "gross receipts" to describe forfeitable property. The original text of both statutes authorized forfeiture of "any property, real or personal, which represents the gross receipts a person obtains . . . ." Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, subtit. H, § 1366(a), 100 Stat. 3707-39.[10] Congress later amended both statutes and substituted the phrase "property . . . involved in [money laundering] . . . ," which was defined as the "proceeds of some form of specified unlawful activity." Anti-Drug Abuse Amendments Act of 1988, Pub. L. 100-690, § 6463, tit. VI, subtit. M, 102 Stat. 4374, 4375. Under the 1988 amendments, Congress continued to use the terms "gross receipts" and "gross proceeds" in both the civil and criminal forfeiture statutes as applied to other designated crimes. *See, e.g.*, 18 U.S.C. § 981(a)(1)(D) & (E) ("gross receipts"); 18 U.S.C. § 981(a)(1)(F) ("gross proceeds"); 18 U.S.C. § 982(a)(1),(3) & (4) ("gross receipts"); 18 U.S.C. § 982(a)(1),(5),(7) & (8)(B) ("gross proceeds").

In sum, Congress was well aware the term "proceeds" commonly means either gross receipts or profits when it enacted the substantive money laundering and forfeiture statutes. It did not use the terms "gross proceeds" or "gross receipts" in Section 1956(a)(1), as it did in other statutes. A profits construction is therefore compelled by the legislative history.

C. The Rule Of Lenity Compels The "Profits" Construction.

As shown, the statutory context and purpose support a "profits" construction. The legislative history also supports a

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[10] The use of the term "gross receipts" in 18 U.S.C. § 1957, also enacted as part of the 1986 Act, was explained in the 1986 House Report: "The term 'gross receipts' was used in this provision to indicate that expenses or overhead incurred by the money launderer are not to be subtracted from the forfeitable 'commission.'" 1986 House Report, H.R. REP. NO. 99-855, at 17.

"profits" construction. Even if the Court still finds the term ambiguous (because there are two equally common meanings), the rule of lenity requires that "proceeds" be given the more lenient construction as "profits."

The rule of lenity is grounded in two fundamental principles. First, due process "mandate[s] that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). Second, "legislators and not the courts should define criminal activity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). The rule of lenity applies to situations "in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990). It is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (quoting H. FRIENDLY, BENCHMARKS 209 (1967)). The rule of lenity requires that an "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (citation omitted). Consequently, when a term is unclear, courts "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (citing *Bass*, 404 U.S. at 347-48).

In all events, and at a minimum, the rule of lenity requires that "proceeds" be given the more narrow profits construction.

D. The Government's Alleged Burden In Proving "Profits" Does Not Override The Profits Construction Of Proceeds Compelled By The Statute's Context And The Canons Of Statutory Construction.

1. The Government complains that it will be too difficult to prove profits in money laundering cases, because criminals and criminal enterprises do not keep regular financial records or leave a paper trail that would enable the Government to meet this burden of proof. This is pure speculation that is belied by the Government's arsenal of evidentiary procedures to prove profits.

The Government is required, and able, to prove "net" amounts (such as profits) under a variety of criminal statutes. For example, in order to prove a defendant guilty of income tax evasion, it is not sufficient merely to establish the defendant's gross receipts, since one does not pay taxes on gross income. The Government is given certain leeway in income tax evasion cases, by allowing it to prove net income through indirect or circumstantial evidence, but it is nevertheless required to do so in order to obtain a conviction. *See Holland v. United States*, 348 U.S. 121 (1954). The Government has the choice of three indirect methods to prove an income tax evasion case: (1) the net worth method which is based on the increase in net worth over a year adding any nondeductible expenses and subtracting nontaxable income, *id.* at 125; (2) the bank deposits method which is based on bank deposits in excess of reported income while the taxpayer has a source of taxable income, *United States v. Venuto*, 182 F.2d 519, 521 (3d Cir. 1950); and (3) the expenditures method which is based on the total cash expenditures during the year minus reported income and nontaxable receipts, *United States v. Caserta*, 199 F.2d 905, 906 (3d Cir. 1952).

Moreover, this is not a good case to evaluate the Government's claims concerning difficulties in proving net income. The Government did not attempt to present evidence

at trial that funds used by Santos in the alleged money laundering transactions were "profits," and thus does not know if any accounting issues would have precluded the introduction of such evidence. This is why, in trying to prove its point, the government must resort to speculative hypotheticals and inapposite examples. *See, e.g.*, Gov't Br. 9, 31-32, 35.

As a practical matter, the Government could have used any of several different accounting methods to show profits, methods that have been developed in similar contexts.[11] *See, e.g.*, *Gerardo v. Comm'r*, 552 F.2d 549, 552 n.6 (3d Cir. 1977) ("Since appellant kept no records . . . 'it was proper and indeed necessary to devise some substitute method for reconstructing income.' . . . Where unreported income from gambling is at issue, the projection of average daily gross income is an acceptable method of reconstruction"); *Gordon v. Comm'r*, 572 F.2d 193, 195 (9th Cir. 1977) ("[i]n light of the propriety of similar methodologies for generating the amount of unreported wager income by extrapolation," reconstruction of unreported income for preceding nine months from one day's wagers upheld).[12]

At bottom, the Government's speculative argument about its burden amounts to the single assertion that it will be more difficult to prosecute criminals with a profits construction. While that may or may not be so, respectfully, it is an argument appropriate for Congress, and not this Court, to address and decide.

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[11] In fact, the Government did estimate Santos' profits, but only in a post-trial custody hearing. *See* Tr. 2180-81, *United States v. Jose Almeda, et al.*, No. 2:96CR44 (N.D. Ind. Oct. 16, 1997).

[12] *See also Milicia*, 769 F. Supp. at 887-89 (utilizing "gross profit" measure that permitted deduction from gross revenues only of cost of goods sold). Defining "proceeds" as gross profits ameliorates the Government's concerns (*see* Br. 27-32) about the need to "formulate an accounting theory for illegal businesses" and questions "such as whether illicit profit should be measured using accrual or cash accounting principles; whether profit should be measured on an annual, monthly or other basis; how 'capital expenses' should be amortized; and what costs can legitimately be deducted to arrive at the profit figure."

2. In connection with its assertion about how the "promotion component . . . has traditionally been understood," the Government provides a lengthy string citation of cases in which "prosecutions based on expense payments" were "brought under the promotion subsection of the money laundering statute." Gov't Br. 23-24 & n.3. Any implication that many or most of those cases could not have been prosecuted under the "profits" rule is mistaken. In the first place, most of the opinions do not reveal what the Government could have proved (or did prove) in relation to such a standard. However, the Government plainly did present evidence of profits used to promote the underlying unlawful activity in some of the cases. *See United States v. Thorn*, 446 F.3d 378, 392 (2d Cir. 2006) (reciting testimony that "funds obtained from illegal projects were used to 'finance the next project' and to expand the business and perform additional illegal work'"); *United States v. Johnson*, 297 F.3d 845, 854 (9th Cir. 2002) (government's evidence supporting money laundering convictions for fraud, mail fraud, and wire fraud based on $8.5 million in profit after deducting "direct expenses for the scheme"). Equally important, several other cases involved ongoing fraudulent schemes in which proceeds from individual frauds were (or apparently were) used to underwrite expenses to carry out additional frauds. *See, e.g.*, *United States v. Lawrence*, 405 F.3d 888, 901 (10th Cir. 2005); *United States v. Coscarelli*, 105 F.3d 984, 986 (5th Cir. 1997). This is possible only if the individual frauds are yielding net proceeds, which in and of itself should satisfy the profits requirement. *See Scialabba*, 282 F.3d at 478 (stating that some of the transactions in *United States v. Jackson*, 935 F.2d 832, 839-42 (7th Cir. 1991), "involved reinvestment of net profits").

III. Contrary To The Government's Argument, There Is No "Financial Transaction Which In Fact Involves" Proceeds.

1. The Government's case also fails for an additional reason. The money laundering statute proscribes "a financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). As the Government says, this requires a "monetary transaction that was separate from and in addition to the underlying criminal activity." Gov't Br. 36-37 (quoting *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997)). Here, however, the only financial transactions the Government showed were: (1) the collection and delivery to Santos of bet money and betting slips, with the "runners" and "collectors" deducting their compensation from bet money before passing on the balance; and (2) the payment of winnings to winning bettors. These are transactions constituting the operation of an illegal gambling business under 18 U.S.C. § 1955(a), not transactions "separate from and in addition to the underlying criminal activity." *Christo*, 129 F.3d at 581.

In *Christo*, money laundering convictions were reversed because "the withdrawal of [bank] funds charged as money laundering was the same as the underlying criminal activity of bank fraud and misapplication of bank funds." *Id.* at 580. Thus, the defendant had not "engaged in a monetary transaction that was separate from and in addition to the underlying criminal activity."[13] *Id.* Similarly, in *United States v. Johnson*, 971 F.2d 562, 567-70 (10th Cir. 1992), money laundering convictions

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[13] *Christo* involved money laundering charged under 18 U.S.C. § 1957. The courts of appeals agree that for purposes of the issue discussed above, "proceeds of specified unlawful activity" under § 1956(a)(1) and "criminally derived property" under § 1957 should be interpreted in the same manner. *E.g., United States v. Mankarious*, 151 F.3d 694, 705-06 & n.1 (7th Cir. 1998); *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995). The Government's brief cites § 1956(a)(1) and § 1957 cases interchangeably.

were reversed where the transactions alleged to constitute money laundering were the same wire transmissions necessary for the underlying wire fraud. The court held that "Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity." *Id.* at 569; *see also e.g.*, *United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001) (reversing money laundering convictions because "[d]iverting the funds were part and parcel of the fraud and theft, and were not a separate act completed after the crime, as required under [§ 1956(a)(1)]").

2. The Government accepts *Christo* and *Johnson* as valid authority, *see* Gov't Br. 36-37 (quoting *Christo*), 37-38 (quoting *Johnson*), and it initially acknowledges the money laundering statute requires "a separation between *the conduct that constitutes the predicate crime* and the conduct that constitutes money laundering," *id.* at 36 (emphasis added). However, the Government then tries to cut back the scope of its "separation" concession. It contends the separation requirement "means [only] that the 'predicate crime must have produced proceeds in *acts* distinct from the conduct that constitutes money laundering.'" *Id.* (emphasis added) (quoting *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. (1998)); *see also id.* ("the money laundering statute 'criminalizes a transaction in proceeds, not the *transaction* that creates the proceeds'") (emphasis added; quoting *Mankarious*). By "acts" producing proceeds and "transaction that creates the proceeds," the Government means – and suggests *Markarious* means – not all of "the conduct that constitutes the predicate crime," but only the component thereof that immediately results in the criminal defendant acquiring proceeds. Gov't Br. 36-38.

Based upon this redefinition, the Government claims that other, subsequent "acts" or "transactions" that are a constituent part of the underlying crime simultaneously constitute the "transaction in proceeds" required by the money laundering statute. *Id.* Applying its theory to the predicate crime in this

case, the Government says the transaction that "generated proceeds" is "a bettor plac[ing] a wager"; hence, it says, "[t]he payments to the couriers and winners thus followed and were distinct from the predicate-offence conduct that generated the proceeds." *Id.* at 40. By this means, the Government seeks to transform "the conduct that constitutes the predicate crime" – which must be separate from the money laundering transaction – into only the particular component of the "predicate-offense conduct" that most immediately or directly "generated the proceeds." The Government's theory is erroneous and should be rejected for several reasons.

First, *Mankarious* involved a different issue: Whether a money laundering transaction can occur before the predicate crime is completed (in that case, before the use-of-the-mails component of mail fraud). *Mankarious*, 151 F.3d at 703-06. While the court answered that question in the affirmative, there was no issue that the money laundering transactions were separate from and in addition to the predicate mail fraud crimes. *Mankarious* involved money laundering under the concealment prong of § 1956(a)(1). The money laundering transactions were payments of the defendants' portion of the mail fraud proceeds to fictitious payees and to front companies those defendants controlled. *Id.* at 706-07.

Second, the *Mankarious* opinion does not indicate even in dicta that the phrases the Government relies upon – *e.g.*, "the transaction that creates the proceeds" – mean the predicate crime may be broken into components, such that some of the "transactions" (or "acts" or "conduct") constituting the predicate crime simultaneously serve as the "transaction in proceeds" necessary for money laundering. Other statements in *Mankarious* negate such an implication. *See id.* at 705 ("Money laundering requires proceeds of a discrete predicate crime"); *id.* at 704 (money laundering requires "'a monetary transaction that was separate from and in addition to the underlying criminal

activity'") (quoting *Christo*, 129 F.3d at 580). The Government is merely singling out certain passages in *Mankarious* that superficially appear to support its theory.

Third, the Government's theory is at odds with the many cases saying a transaction in proceeds under the money laundering statute must "follow" or "come after" the underlying criminal activity is "completed." *See, e.g., United States v. Silvestri*, 409 F.3d 1311, 1334 (11th Cir. 2005) ("'the primary issue in a money laundering charge involves determining when the predicate crime becomes a completed offense after which money laundering can occur'") (quoting *Christo*, 129 F.3d at 579-80); *McGahee*, 257 F.3d at 528 (money laundering requires "a separate act completed after the crime"). This Court itself has said money laundering statutes "interdict only the financial transactions . . . , not the *anterior* criminal conduct that yielded the funds allegedly laundered." *United States v. Cabrales*, 524 U.S. 1, 7 (1998) (emphasis added).

The Government notes that these statements often cannot be taken literally in a temporal sense, since in some circumstances a laundering transaction in proceeds can occur before the underlying crime is completed. Gov't Br. 38. That point, while correct, does not address the "separate transaction" issue.[14] The Government also asserts these cases stand only for the proposition that "the predicate offense must first generate proceeds before those proceeds can be laundered." *Id.* This is not correct.

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[14] There are also situations in which the money laundering transaction may occur simultaneously with completion of the underlying crime. *See, e.g., LeBlanc*, 24 F.3d at 347 (when bet money was collected after bets were lost, defendant had losing gamblers pay by checks to fictitious payees to conceal the source of the funds); *United States v. Pretty*, 98 F.3d 1213, 1220-21 (10th Cir. 1996) (defendant had illegal kickbacks "filtered through real estate transactions" to conceal source of money).

The true import of the cases saying money laundering must come "after" the underlying crime is that a money laundering transaction must be separate, distinct and discrete from the underlying criminal activity. *Christo* itself is an excellent example, stating that money laundering occurs "after" the "predicate crime becomes a 'completed offense,'" 129 F.3d at 579-80 (citation omitted), and then clarifying that this means there must be "a monetary transaction that was separate from and in addition to the underlying criminal activity," *id.* at 580. *See also, e.g., United States v. Greenidge*, 2007 U.S. App. LEXIS 17084, at *33-34 (3d Cir. July 17, 2007) (stating that "to support a charge of money laundering, there must have been a 'discrete predicate crime' which 'produced proceeds in acts distinct from the conduct that constitutes money laundering,'" and accepting "the government's argument that the conspiracy to commit bank fraud was complete when the stolen and altered check was deposited") (quoting *Mankarious*, 151 F.3d at 705); *United States v. Misla-Aldarundo*, 478 F.3d 52, 68 (1st Cir. 2007) (quoting *Mankarious*' statement that "money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds," and holding that "[t]he transaction that created the proceeds – the act of extortion – is sufficiently distinct from the side transactions done to hide the trail – *e.g.*, writing checks to relatives and aides – even if both crimes were complete only upon the arrival of the funds in [defendant's] hands").[15]

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[15] *See also United States v. McCarthy*, 271 F.3d 387, 395 (2d Cir. 2001) ("when the underlying crime is completed, a transaction conducted with the proceeds may provide the basis for a money laundering conviction"; "[o]ur case law consistently distinguishes between the crime that produces proceeds and the subsequent crime of laundering those proceeds, even though the transactions may flow together"); *Heaps*, 39 F.3d at 486 ("Although the Tenth Circuit [in *Edgmon*, 952 F.2d at 1213-14] . . . perhaps placed too much emphasis on the temporal distinction between past and future crimes, its insight into Congress' intention is valuable. Congress intended to prevent an ill other than those already prohibited by other laws.").

Fourth, the Government's theory that the money laundering transaction in proceeds can be a component of the predicate crime (after one or more earlier components "generated proceeds") is inconsistent with Congress' intent that the money laundering statute provides "a separate crime distinct from the underlying offense that generated the money," *LeBlanc*, 24 F.3d at 346; "create[s] a new federal crime rather than . . . further punish[es] the underlying criminal activity," *Stavroulakis*, 952 F.2d at 691; and "punish[es] activity that was not previously punished," *Edgmon*, 952 F.2d at 1214.

Fifth, the Government cites no case in which a component of the underlying criminal activity alone was also held to be a "transaction in proceeds" under the money laundering statute. Existing authority is to the contrary. For example, in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), the court held that downstream payment by the street seller to the distributor in an illegal drug transaction is not a "transaction in proceeds" under the money laundering statute even though the predicate crime generated proceeds in the street seller's upstream transaction with the buyer.

> For some purposes, the illegal drug sales here were completed when the seller and purchaser exchanged the drugs and the money. The seller of the drugs could have been convicted of distribution at the point of sale even though the proceeds were never returned to [the distributor]. We do not intend to change that traditional sense of when a drug transaction between buyer and seller is complete. However, for purposes of the money laundering statute here being analyzed, the underlying drug transaction had not yet been completed [before the distributor was paid] and the money laundering activity had not yet begun.

Id. at 1246.

The Government may contend that *Febus* and *Iacaboni* support its position, in that the transactions in proceeds there were payments to winning bettors (and, in *Febus*, also the collectors subtracting their commissions before delivering the bet money). However, neither case considered whether those payments were "financial transactions which in fact involved the proceeds" of conducting an illegal gambling business. 18 U.S.C. § 1956(a)(1). Rather, the argument those cases considered and rejected was that these payments could not constitute "promotion" under § 1956(a)(1)(A) because they were part of the predicate crime of conducting an illegal gambling business.

3. In support of its theory, the Government also argues that "proceeds may be derived either 'from an already completed offense' or from 'a completed phase of an ongoing offense.'" Gov't Br. 38 (quoting *Conley*, 37 F.3d at 980). However, "completed phase" in *Conley* means a *completed crime* where the criminal activity (there, conducting an illegal gambling business) is also a continuing crime. After reiterating that money laundering under § 1956 is "intended . . . to apply to transactions occurring after the completion of the underlying criminal activity," the court noted that the laundering transactions involved the disposition of monies "collected from the [video] poker machines" in various business establishments where the gambling activity occurred. 37 F.3d at 980 (citation omitted).

In other words, the "proceeds" of conducting an illegal gambling business in *Conley* was money that remained after the bets were collected and the winners were paid, and the money laundering "transactions in proceeds" involved their subsequent division and distribution. *Id.*; *see also United States v. Morelli*, 169 F.3d 798, 804 (3d Cir. 1999) ("[t]he money laundering aspect of the scheme [in *Conley*] derived from the retrieval and distribution of the money deposited in the machines" after "the specified unlawful activity had been completed"). Here,

by contrast, the Government proved only the core gambling business transactions of collecting bet money and paying winners.[16]

4. The Government finally argues it is not slicing the predicate gambling business offense into component "transactions," but rather is maintaining the distinction between that predicate crime and money laundering, because "the payments to employees and winners" are "not elements of" conducting an illegal gambling business under 18 U.S.C. § 1955. That is so, the Government says, because (1) "[p]roof that payments were made to employees and winners" is not required under 18 U.S.C. § 1955(b)(1); and (2) under Indiana law – which is an essential component of Santos' § 1955 violation – "a gambling offense . . . is complete at the time the wager is placed." Gov't Br. 41 (citing IND. CODE § 35-45-5-3(a)(4) (making it a crime to "sell chances" in "lotteries") and (a)(6) (making it a crime to "accept[] . . . for profit, money . . . risked in gambling")).

The Government is simply wrong on this point. The professional gambling crimes listed in Indiana Code § 35-45-5-3(a) must come within the statutory *definition* of "gambling" provided by Indiana Code § 35-45-5-1. As defined, "gambling" requires "risking money or other property *for gain*, contingent in whole or in part upon lot [or] chance . . . ." IND. CODE § 35-45-5-1 (emphasis added). "Gain" in turn "means the direct realization of winnings." *Id.* Hence, professional gambling under the Indiana statutes requires payment of winners – money must be risked on the possibility of "gain" ("realization of winnings")

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[16] *United States v. Butler*, 211 F.3d 826 (4th Cir. 2000) (Gov't Br. 36), involves the same point in the context of bankruptcy fraud. While the defendant's concealment of assets from the trustee was a continuing offense, he had committed the crime of bankruptcy fraud (a "completed phase of an ongoing offense") in a transaction separate from the later financial transactions charged as money laundering. *Id.* at 828, 829-30.

and that possibility must depend, at least in part, on lot or chance. If there is no possibility of such "gain" – no possibility that a bettor will realize winnings – then there is no "gambling" under Indiana law.

This plain meaning of the Indiana statutes is also confirmed by Indiana case law. Under the current and substantively similar former Indiana statutes, the Indiana courts have repeatedly said that (1) an essential element of an illegal lottery – which is proscribed by § 35-45-5-3(a)(4), and of which Santos' bolita is one type – is one or more "prizes"; and (2) a second essential element is that the prize or prizes be distributed by chance:

> A "lottery" is a scheme for the distribution of prizes by lot or chance . . . . *It has three essential elements: consideration, chance and prize* . . . .
>
> So defined, bingo played for a prize received by chance or lot is a lottery and prohibited by [§] 35-45-5-3(4).

Pruitt v. State, 557 N.E.2d 684, 690-91 (Ind. Ct. App. 1990) (emphasis added) (citing, *inter alia*, *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 40, 142 N.E.2d 610, 614 (1957); *see also L.E. Serv., Inc. v. State Lottery Comm'n*, 646 N.E.2d 334, 340 (Ind. Ct. App. 1995) ("The elements of a violation of [Indiana Code §] 35-45-5-3(a)(6) are . . . (4) money risked in gambling"); *id.* at 342 (gambling is "define[d] . . . as 'risking money . . . for gain, contingent in whole or in part upon lot [or] chance'") (quoting § 35-45-5-1).

As well as incorporating these state law standards, the federal gambling statute adds that conducting an illegal gambling business must "involve[] five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business." 18 U.S.C. § 1955(b)(1)(ii). Hence, the predicate crime

clearly contemplates that the gambling business must involve several individuals, *e.g.*, bet collectors, runners, and owners. Just as paying winners is part of the offense of running an illegal gambling business, so too is paying the individuals required to run the gambling business. Section 1955 "does not prohibit gambling per se; rather, it punishes those who 'conduct[] . . . an illegal gambling *business*.'" *United States v. Wall*, 92 F.3d 1444, 1449 (6th Cir. 1996) (citation omitted) (emphasis in original). *Cf. Sanabria v. United States*, 437 U.S. 54, 70 (1978) (discrete acts of gambling are not independent federal offenses).

Based on its erroneous position concerning when "a gambling offense . . . is completed," the Government argues that "[i]f the law were otherwise, a defendant could avoid violating the statute, while enjoying the profits from his gambling operation, by fraudulently refusing to pay employees and successful bettors." Gov't Br. 41. This makes no sense. A person who never paid employees or winning bettors (as the Government's hypothetical would require "to avoid violating the [gambling] statute") undoubtedly would be guilty of another crime, such as fraud, and perhaps theft as well. Such a person would not, however, be guilty of conducting a *gambling* business.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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